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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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ACS of Alaska, Inc.,
ACS of Fairbanks, Inc., and
ACS of the Northland, Inc.

DOCKET FILE

Petition to Amend Section 51.405 of the
Commission's Rules to Implement the
Eighth Circuit's Decision in *Iowa Utilities
Board v. FCC* Regarding the Burden of
Proof in Rural Exemption Cases Under
Section 251(f)(1) of the Communications Act

CC Docket No. 96-98

OPPOSITION TO PETITION FOR RULEMAKING

General Communication, Inc. ("GCI"), by its undersigned attorneys, hereby opposes the Petition for Rulemaking filed by ACS of Alaska, Inc., ACS of Fairbanks, Inc., and ACS of the Northland, Inc. (collectively, "ACS") on March 5, 2001. ACS requests revision of Section 51.405 of the Commission's rules with no opportunity for comment, in violation of the Administrative Procedure Act and Commission rules and policy.

I. BACKGROUND

GCI is a diversified communications carrier offering interexchange, local exchange, Internet, and other services in Alaska. GCI's local exchange service is currently limited to Anchorage, where it has been interconnected with ACS of Anchorage, formerly Anchorage Telephone Utility, since 1997. GCI also intends to provide competitive local exchange service to Fairbanks and Juneau, Alaska, pursuant to an interconnection agreement approved by the

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Regulatory Commission of Alaska (“RCA”) on October 5, 2000.¹ The ACS Petition is the latest in a series of ACS tactics to delay local competition in Fairbanks and Juneau.² GCI originally requested interconnection in 1997 and since that time has had to engage in myriad administrative and court proceedings just to negotiate and arbitrate an agreement.

ACS has initiated proceedings before the Alaska state court and federal court to vacate the RCA’s 1999 decision to terminate the rural exemption of ACS subsidiaries in Fairbanks and Juneau and the RCA’s approval of the interconnection agreement. In every forum possible, ACS seeks to frustrate the promise of local competitive services to consumers in the ACS service areas. The Alaska Superior Court already has denied ACS’ Motion for Stay of its interconnection obligations.³ Unhappy with the state court’s decision not to stay the introduction of full local exchange competition in Fairbanks and Juneau, ACS is now shopping the issue with the Commission in the hopes of effectively securing a new basis to vacate the RCA’s orders allowing full local exchange competition to proceeding Fairbanks and Juneau.⁴ This request is

¹ Petition by GCI Communication Corp. d/b/a General Communication, Inc., and d/b/a GCI for Arbitration with PTI Communications of Alaska, Inc., Telephone Utilities of Alaska, Inc., and Telephone Utilities of the Northland, Inc., under 47 U.S.C. §§ 251 and 252 for the Purpose of Instituting Local Exchange Competition, Order Approving Interconnection Agreement and Denying Request for Establishment of Interim and Refundable Rates, U-99-141(10)/U-99-142(10)/U-99-143(10) (RCA Oct. 5, 2000).

² After Anchorage, Juneau (the state capital) and Fairbanks are the two largest urban centers in Alaska.

³ Telephone Utilities of Alaska, Inc. v. Regulatory Comm’n of Alaska, No. 3AN-99-3494, slip op. (Alaska Sup. Ct. Feb. 9, 2001). ACS has recently petitioned the federal court for similar relief. See ACS of Fairbanks, et al. v. Regulatory Comm’n of Alaska and General Communication Corp d/b/a General Communication, Inc., No. A-00-288-CIV (JKS), ACS Motion to Enjoin Implementation of Interconnection Agreements (Mar. 13, 2001).

⁴ ACS seeks the revision because it “has been unable to obtain a stay of [RCA] orders,” seeking a “legal victory” from the Commission where prior efforts before appropriate fora have been unsuccessful. See Petition for Rulemaking at 5. Given that ACS credits its failure to

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hardly for a “ministerial order” of nationwide significance, but, as ACS’ own description of the Alaska proceedings to date demonstrates, is designed to influence the outcome of ACS’ legal challenges to the RCA’s orders that are now pending in both Alaska state and federal courts. Should the Commission address the Petition for Rulemaking at all, the issues raised therein must be subject to notice and comment procedures required by the Administrative Procedure Act (“APA”).

II. THE ACS PETITION CANNOT BE EXCEPTED FROM APA REQUIREMENTS FOR NOTICE AND COMMENT

ACS claims to request a “ministerial order” from the Commission, revising Section 51.405 of its rules without opportunity for notice and comment, “to provide clarification in a case pending before the Alaska courts.” As ACS itself concedes, it is seeking the Commission’s intervention in a live dispute that ACS itself initiated against the Regulatory Commission of Alaska and GCI in Alaska state court.⁵ Contrary to the expedient ACS characterization, its Petition for Rulemaking raises significant issues regarding the implementation of Section 251(f) of the Act, which issues are precisely the type that must be accorded notice and comment as required under the APA.

Section 553 of the APA requires that after notice is provided as required under subsection (a), “the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral

(..continued)

secure a stay in adversarial proceedings as the genesis for its Petition for Rulemaking, GCI questions why ACS did not see fit to serve parties to those adversarial proceeding with its Petition.

⁵ See Petition for Rulemaking at 5-6. ACS has also appealed the RCA’s order approving interconnection to federal district court. In that proceeding, ACS further claims that the rural exemption should be reinstated in support of its request that the court enjoin interconnection.

presentation.”⁶ Though the Commission may except “notice and public procedure” where it finds that these are “impracticable, unnecessary, or contrary to the public interest,”⁷ such exceptions are to be construed narrowly.⁸ ACS claims that “prior notice and opportunity for public comment are unnecessary in this case,” citing cases where the Commission codified statutory language, revised universal service contribution requirements, deleted references in an existing rule to an invalidated policy, and amended the Table of Allotments where military functions of the United States would be impacted.⁹ None of these cases present issues that are remotely similar to ACS’ instant request to adopt a new rule in an effort to resolve in its favor disputes pending before the Alaska state and federal courts.

ACS first cites the Commission’s order implementing the Section 254(k) prohibition on cross-subsidization of competitive services with non-competitive services. In that order, the Commission “merely codifie[d] the requirements of the Act and involve[d] no discretionary action by the Commission.”¹⁰ In plain contrast, ACS seeks not to have the Commission codify the very words of Section 251(f)(1), but proposes an entirely new provision, by which it purports

⁶ 5 U.S.C. § 553(c).

⁷ 5 U.S.C. § 553(b)(B); see also 47 C.F.R. § 1.412(c).

⁸ See Tennessee Gas Pipeline Co. v. FERC, 969 F.2d 1141, 1144 (D.C. Cir. 1992) (“Despite the broad nature of this language [of Section 553(b)(B)], our cases make clear that the good cause exception is to be ‘narrowly construed and only reluctantly countenanced.’”) (quoting State of New Jersey v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980)); Mobay Chemical Corp. v. Gorsuch, 682 F.2d 419, 426 (3d Cir.), cert. denied, 459 U.S. 988 (1982).

⁹ See Petition for Rulemaking at 7-8.

¹⁰ Implementation of Section 254(k) of the Communications Act of 1934, as amended, Order, 12 FCC Rcd 6415, 6421 (¶ 9) (1997).

“to codify the Eighth Circuit’s rule on burden of proof under Section 251(f)(1) of the Act.”¹¹

The practical word-for-word implementation of a statutory provision, as was the case for the Section 254(k) order, is easily distinguished from the proposed adoption of a rule drafted by an interested party based on its interpretation of a court decision. Indeed, not only does the adoption of new regulatory language require exercise of Commission discretion subject to APA notice and comment, but ACS would have the Commission rely on ACS’ discretion without any opportunity for notice and comment. There is no precedent for such a departure from the procedural requirements of the APA.¹²

ACS’ reliance on other Commission decisions is similarly misplaced. ACS states that “where a court decision has invalidated a Commission policy . . . the Commission has held that no purpose would be served by initiating notice and comment proceedings to amend the rules.”¹³

¹¹ See Petition for Rulemaking at 9.

¹² See, e.g., 1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17543 (¶ 48) (1999) (“Because this revision is a procedural change that relaxes a filing requirement, we find that notice and comment procedures are unnecessary and need not be followed prior to adoption.”); 1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission’s Rules, Notice of Proposed Rulemaking and Order, 13 FCC Rcd 14849, 14881 (¶ 69) (1998) (finding that revisions to clarify and correct existing rules need not be subject to notice and comment procedural requirements because they are “non-controversial and will have no adverse effect and any party”); Amendment of Part 87 of the Rules Concerning Requirements for Remote Communications Outlets and Radionavigation Land Test Stations, Order, 8 FCC Rcd 8557, 8558 (¶ 8) (1993) (“The rule changes are minor and non-controversial and the public is not likely to be interested in them. Therefore we find good cause that compliance with the notice and comment procedure of the APA is unnecessary.”); see also Letter to Claircom Licensee Corp. from James D. Schlichting, Deputy Chief, Wireless Telecommunications Bureau, 15 FCC Rcd 13266 (2000) (“All of the licensees who could be affected by amending the geographic channel block layout have individually reviewed and affirmed the correctness of the revisions set forth in the Appendix to this letter. Therefore, we are granting the relief requested without formally seeking comments from the public.”).

¹³ Petition for Rulemaking at 7-8.

This was not, however, the Commission's holding in the Tariff Filing Requirements Order, cited by ACS.¹⁴ Instead, the Commission simply deleted references to forbearance in Section 43.51(a) of its rules, which conformed the rule with a court decision invalidating the Commission's forbearance policy and left intact the remainder of the rule already adopted in a rulemaking proceeding.¹⁵ ACS also cites the Commission's change in the universal service contribution base for the general proposition that the Commission dispenses with notice and comment to adopt rule changes on remand prior to the court's mandate taking effect.¹⁶ Again, ACS misses the mark. Consistent with the Tariff Filing Requirements Order, Commission action was limited to excluding certain revenues from the universal service contribution assessment already set forth in an existing rule promulgated in a notice-and-comment proceeding.¹⁷ Thus, in neither case did the Commission even consider the notion of implementing a new rule to replace a vacated rule without notice and comment, as proposed by ACS.

Finally, ACS cannot find support in Commission amendment of the Table of Allotments consistent with the express exemption from notice and comment procedures for actions impacting the military function. Pursuant to Section 553(a)(1) of the APA, the Commission may "forego the procedural requirements that typically apply in rulemakings in matters directly

¹⁴ See id. at 8 n.19 (citing Tariff Filing Requirements for Non-Dominant Common Carriers, Order, 10 FCC Rcd 13653, 13657 (1995)).

¹⁵ Tariff Filing Requirements Order, 10 FCC Rcd at 13657 (¶ 20).

¹⁶ Petition for Rulemaking at 8 n.20.

¹⁷ Federal-State Joint Board on Universal Service, Sixteenth Order on Reconsideration in CC Docket No. 96-45, Eighth Report and Order in CC Docket No. 96-45, Sixth Report and Order in CC Docket No. 96-262, 15 FCC Rcd 1679, 1685-86 (¶¶ 15-16) (1999).

impacting a military function of the United States.”¹⁸ ACS does not — as it cannot — liken the action it is requesting to a matter “directly impacting a military function of the United States,” and instead, the action requested by ACS is one that must be subject to “the procedural requirements that typically apply in rulemakings.”

At bottom, ACS is not proposing adoption of the statute as a verbatim rule, a revision to an existing rule as a matter of administrative necessity, or any action that falls within an express APA exemption or is consistent with prior exercise of Commission discretion under Section 553(b)(B) of the APA. Instead, ACS seeks adoption of a substantive, discretionary rule with the stated purpose of affecting the outcome of pending court proceedings. Against this background, the issue presented plainly is one that must be subject to a notice and comment proceeding to resolve issues of general applicability, if the Commission entertains this issue at all.¹⁹ Moreover, if the Commission does determine to undertake a rulemaking proceeding, then it must open consideration of the text of that rule to all interested parties. This is the course followed by the Commission with respect to every rule adopted to implement Section 251,²⁰ and ACS has

¹⁸ Amendment of the Commission’s Rules to Relocate the Digital Electronic Message Service, Memorandum Opinion and Order, 13 FCC Rcd 15147, 15157 (¶ 23) (1998).

¹⁹ State commissions have the primary authority to implement Section 252(f)(1), and, as ACS has recognized, “the Commission largely left interpretation of the requirements of Section 251(f) to the states.” Petition for Rulemaking at 6. Thus, it is not the case, as ACS claims, that the Commission must now adopt a rule to replace that vacated by the Eighth Circuit. Indeed, according to ACS, the Eighth Circuit relied on “the plain meaning of the language in Section 251(f)(1)(A),” thus calling into question why adoption of a rule implementing that same “plain meaning” would be of any national benefit whatsoever.

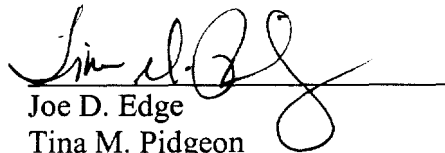
²⁰ See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996); Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 1932 (1996); Third Report and Order, 15 FCC Rcd 3696 (1999) (case histories omitted).

provided no compelling reason why the Commission may depart from this practice now and still satisfy the APA requirements for notice and comment rulemaking proceedings.

III. CONCLUSION

For these reasons, ACS has presented no compelling reason to depart from the notice and comment requirements of the Administrative Procedure Act with respect to the ACS Petition for Rulemaking. Instead, the APA and Commission precedent require that the Petition be placed on Public Notice prior to any Commission action to determine whether a rulemaking is even necessary, and if so, the Commission and parties can then consider the contours of any Commission rule to implement Section 252(f)(1) of the Act.

Respectfully submitted,



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Dated: April 5, 2001

CERTIFICATE OF SERVICE

I, Colleen A. Mulholland, hereby certify that a copy of the foregoing Opposition to Petition for Rulemaking by General Communication, Inc. was delivered to each of the following parties by first-class mail, unless otherwise indicated, on April 5, 2001:

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